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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM _____

STATE OF FLORIDA, :

Petitioner, :

v. : NO. 73-1

KEITH IVAR ANDERSEN, :

Respondent. :

_____ :

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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CITATION OF AUTHORITIES

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RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PRELIMINARY STATEMENT

Petitioner, the State of Florida, seeks in these proceedings to review a decision of the Supreme Court of Florida officially reported at 274 So.2d 228 (Fla. 1973). This brief is submitted by respondent in opposition to said Petition for a Writ of Certiorari to the Supreme Court of Florida, as permitted by Rule 24, Supreme Court Rules.

Respondent respectfully urges, for the reasons set forth below, that this cause is not a proper one for review by this Court; that jurisdiction of this cause is not demonstrated under 28 U.S.C., Section 1257(3); that this

cause does not present the reasons and considerations for review set forth by Rule 19, Supreme Court Rules; and that certiorari should be denied.

Petitioner, the State of Florida, shall hereinafter be referred to as "Florida".

STATEMENT OF THE CASE AND FACTS

Respondent respectfully submits that the Statement of the Facts set forth in the Petition for a Writ of Certiorari to the Supreme Court of Florida is less than complete and by its omissions is misleading. This statement is for the purpose of correcting said omissions.

Florida, at page 7 of its aforementioned petition, has quoted from the petition of respondent before the Supreme Court of Florida that the constitutional provisions which this case involves are the Fourth Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

In so doing, Florida has omitted significant portions of the petition of respondent before the Supreme Court of Florida.

In petitioning the Supreme Court of Florida for a writ of certiorari to review the decision of the First District Court of Appeal, respondent stated on page 10 of said petition as follows:

> . . . said decision of the District Court of Appeal, First District, is not only erroneous in said points of conflict, but as to each such point also denies to Petitioner the guarantees of Article 1, Section 12, of

> the Florida Constitution, and of the Fourth and Fourteenth Amendments to the Constitution of the United States of America. (Emphasis supplied.)

In the Petition for a Writ of Certiorari to the Supreme Court of Florida now before this Court Florida omitted the emphasized passage set forth above. Article 1, Section 12 of the Florida Constitution, referred to above, provides:

> §12. Searches and seizures
> The right of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

This case, therefore involves Article 1, Section 12 of the Florida Constitution, and the guarantees set forth therein, the same being before the Supreme Court of Florida.

In the Statement of the Facts of that Petition for a Writ of Certiorari to the Supreme Court of Florida, Florida has further overlooked and omitted to advise this Court that in such certiorari proceedings before the Supreme Court of Florida, once jurisdiction is accepted the assertions of grounds of error are set forth

as points of Petitioner's Brief on the Merits. Such is the system governing such proceedings under Rule 4.5c(6), Florida Appellate Rules.

The points of error presented to the Supreme Court of Florida in this case by Petitioner's Brief on the Merits were as follows:

POINT ONE

THE AFFIDAVIT IN THIS CASE, BEING BASED UPON MULTIPLE HEARSAY AND FAILING TO ALLEGE THE SOURCE OF THE NONCONFIDENTIAL INFORMANT'S ALLEGED INFORMATION, IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE OR TO MEET THE REQUIREMENTS OF ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION; THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; OR SECTION 933.18, FLORIDA STATUTES.

POINT TWO

THE ALLEGATIONS IN THE AFFIDAVIT OF A PACKAGE AT THE POST OFFICE AND OF A PRIOR DRUG PURCHASE WERE TOTALLY INSUFFICIENT TO SUPPORT ISSUANCE OF A SEARCH WARRANT FOR A PRIVATE DWELLING UNDER THE COMMANDS OF ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION; THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; AND SECTION 933.18, FLORIDA STATUTES.

POINT THREE

THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN UPHOLDING THE SEARCH WARRANT FOR DEFENDANT'S PRIVATE DWELLING, ACCORDED SAID WARRANT A DEFERENCE OR PRESUMPTION OF REGULARITY WHICH IS PROHIBITED BY ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION; SECTION 933.18, FLORIDA STATUTES; AND PRIOR DECISION OF THE FLORIDA SUPREME COURT.

Said points, serving the purpose of assignments of error, establish that in addition to Article 1, Section 12, of the Florida Constitution, there was also before the Supreme Court of Florida the command of Section 933.18, Florida Statutes 1971, providing that:

> 933.18 When warrant may be issued for search of private dwelling.--No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:
> (1) It is being used for the unlawful sale, possession, or manufacture of intoxicating liquor;
> (2) Stolen or embezzled property is contained therein;
> (3) It is being used to carry on gambling;
> (4) It is being used to perpetrate frauds and swindles;
> (5) The law relating to narcotics or drug abuse is being violated therein;
> (6) A weapon, instrumentality, or means by which a felony has been committed is contained therein; or
> (7) Unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding or lodging house.
> The term 'private dwelling' shall be construed to include the room or rooms used and occupied, not transiently but solely as a residence, in an apartment house, hotel, boarding-house, or lodging house. No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some creditable witness that he has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based.

Respondent respectfully submits that, only when including consideration of the above-quoted provisions of Article 1, Section 12 of the Florida Constitution and Section 933.18, Florida Statutes 1971, is the statement of facts and the case in this cause complete.

ARGUMENT

POINT ONE

THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA FAILS TO ESTABLISH THAT THE SUPREME COURT OF FLORIDA HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE, THERE BEING BEFORE THE SUPREME COURT OF FLORIDA ADEQUATE AND APPLICABLE NON-FEDERAL STATE GROUNDS ON WHICH TO DETERMINE AND BASE SAID DECISION.

In this case the Attorney General of the State of Florida seeks to have this Court review and overturn a decision of the Supreme Court of Florida, wherein the Supreme Court of Florida held that certain evidence in a criminal case should be suppressed for the reason that the search warrant whereby such items were seized was not supported by sufficient affidavit.

In those proceedings before the Supreme Court of Florida, and at all earlier levels, respondent urged that said affidavit was insufficient to meet the commands of Article I, Section 12, of the Florida Constitution; was insufficient to meet the commands of the Fourth and Fourteenth Amendments to the Constitution of the United States; and was insufficient to meet the commands of Section 933.18, Florida Statutes 1971, which specifically governs search warrants for the invasion of private dwellings in Florida and provides in pertinent part:

933.18 When warrant may be issued for search of private dwelling.--No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:

* * *

(5) The law relating to narcotics or drug abuse is being violated therein;

* * *

. . . No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of some creditable witness that he has reason to believe that one of said conditions exists, which affidavit shall set forth the facts on which such reason for belief is based.

The Florida Supreme Court described the affidavit in question as follows:

> The record proper discloses that the affidavit in question was executed by a Tallahassee special law enforcement agent, Bondurant, who obviously had no personal knowledge of the events contained in his affidavit. Bondurant related that a special law enforcement agent, Sheridan, of Orlando (some 240 miles from Tallahassee) told him that one week prior thereto a search conducted in Ft. Pierce (some 115 miles from Orlando) revealed drugs and certain letters from the petitioner implicating him in drug traffic. Attached to Bondurant's affidavit were several (reproduced in typed form) copies of alleged letters from petitioner. Bondurant never related whether Sheridan's information was to his personal knowledge or whether, if hearsay, that Sheridan had reason to believe it. In fact, Bondurant never indicated that he knew or was personally acquainted with Sheridan. Bondurant stated he was then 'advised' by certain 'officials' of the Tallahassee Post Office Department that the department was in possession of a letter addressed to petitioner which appeared to contain

some bulky substance other than paper. However, Bondurant never named the postal 'officials' talked to, whether their observations were personal, or hearsay through other postal employee, and, if so, that they had good reason to believe it.

Thus, the stage is set for a legal determination of the sufficiency of the affidavit to support the search warrant and resultant seizure, the conclusion of which determine petitioner's ultimate guilt or discharge in this case.

The Supreme Court of Florida thereafter held as to said affidavit that:

> Applying the foregoing principles to the affidavit sub judice, its tensile strength is stretched beyond endurance: affiant Bondurant obviously had no knowledge of the events described except through 'Sheridan' and certain 'officials' of the post office department; Bondurant, in fact, never stated whether he was personally acquainted with Sheridan or the postal 'officials'; there was no showing of Sheridan's knowledge (personal or hearsay, and, if hearsay, good reason for Sheridan believing it); and there was no showing of the postal 'officials' knowledge to be personal or hearsay through other employees, and, if hearsay, their good reason for believing it. Any conclusion of a crime to be drawn from the affidavit rests upon a hopeless pyramiding of inferences. Agent Bondurant may 'in his opinion' had had good reason for 'his' belief that a search warrant should be issued, but that is not the legal test to be applied where his conclusion is based on hearsay. The affidavit of 3 typewritten pages, containing numerous handwritten corrections, was obviously no sudden ebullition, and could have easily contained the factors we have commented on, if known and if true.
>
> Law is and should be profound, and our conclusion is not to be construed as an avalanche of vituperation. In this case only, and upon these given facts, the affidavit falls short of being sufficient.

The Supreme Court of Florida, in holding the said affidavit insufficient, cited both state and federal prior

decisions, but did not expressly state whether its holding of insufficiency was grounded upon violation of the Constitution of the United States of America, of Article I, Section 12, of the Florida Constitution, or of Section 933.18, Florida Statutes 1971.

Each of the latter two state grounds was before the Florida Supreme Court as a basis for its decision. Each of said state grounds was urged by respondent herein as compelling the holding of insufficiency.

In this regard it is pertinent that by its plain terms Article I, Section 12, varies from the Fourth Amendment to the Constitution of the United States; provides broader specific protections than said Fourth Amendment; and expressly incorporates the exclusionary rule as a command of the Florida Constitution. In Tollett v. State, 272 So.2d 491 (Fla. 1973), the Florida Supreme Court held that Article I, Section 12, of the Florida Constitution provided broader protection from searches and seizures, in some instances, than the Fourth Amendment to the United States Constitution.

In this regard it is of even greater significance that Section 933.18, Florida Statutes, governing search warrants for private dwellings in Florida, imposes restrictions on the issuance of such search warrants even in excess of the guarantees of the Florida Constitution and the Constitution of the United States.

Section 933.18, Florida Statutes 1971, for example, enumerates in seven specific instances one of which must be shown in order for a search warrant to issue for a private dwelling. Even though other non-enumerated grounds might satisfy the minimum requirements of the Fourth Amendment to the United States Constitution, an affidavit setting forth only such non-enumerated ground would nevertheless be insufficient for the issuance of a search warrant for a private dwelling by the express terms of Section 933.18, Florida Statutes 1971.

Further, as to Section 933.18, Florida Statutes 1971, the law of Florida, in contrast to federal cases, is that the affidavit for a warrant to search a private dwelling must show probable cause on the face thereof and the State is not permitted to support the affidavit with additional evidence.

In Panzavecchia v. State, 201 So.2d 762 (3d D.C.A. Fla. 1967), as to the requirements of Section 933.18, Florida Statutes 1971, regarding search warrants for private dwellings the Court held at page 763 that:

> §933.06 and §933.18, Fla.Stat., F.S.A., were originally enacted at the same Session of the Legislature. §933.06, Fla. Stat., F.S.A., relates generally to search warrants, and §933.18, Fla.Stat., F.S.A., relates specifically to the search of a dwelling house. There is no dispute on this record that the premises searched was a dwelling house and the residence of the appellant. We hold that an affidavit in support of a search warrant for a dwelling house

> must show probable cause of the face thereof and that the State is not permitted to support the affidavit with additional evidence, as permitted by §933.06, Fla.Stat., F.S.A. It is reasonable to assume that the Legislature intended, when it enacted the original statutes [which were the forerunners of the present sections] to require a more strict procedure for obtaining the search of a dwelling house than the procedure to be available for general searches. . . . It is apparent that the Legislature was not content to rely on this general proposition as, in §933.18, Fla.Stat., F.S.A., it specifically provided: 'No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling * * *' unless based upon an affidavit in accordance with this section. (Emphasis supplied)

Respondent respectfully submits that where Article I, Section 12 of the Florida Constitution and Section 933.18, Florida Statutes 1971, were both properly before the Supreme Court of Florida and where each provides more stringent mandatory requirements for the issuance of a warrant for the search of a private dwelling than does the Fourth Amendment to the Constitution of the United States, said decision is not properly before this Court.

There was before the Florida Supreme Court adequate and independent non-federal ground upon which the holding of insufficiency may have been and, in light of more stringent requirements, most probably was based. In this regard it is pertinent that the Florida Supreme Court had before a state

warrant in a state criminal case urged to be invalid under state law and the state constitution, as well as the federal constitution. There is presented to this Court no violation of federal constitutional right, and no determination of a federal question on federal grounds.

In this regard, respondent notes that though the Florida Supreme Court stated that the rationale of Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584, 21 L Ed.2d 637 (1969) had been "adopted" by the Supreme Court of Florida, that language does not establish that the decision of the Florida Supreme Court was based on federal rather than state grounds. Indeed, the phrase ". . . adopted the rationale of . . ." indicates to the contrary for in construing and applying a federal right the Florida Supreme Court would not adopt but would be controlled by this Court's prior holding, whereas in construing and applying an independent but broader state right the Florida Supreme Court would be free to adopt and follow this Court's rationale regarding the similar federal right.

Respondent respectfully submits that the prior decisions of this Court establish that this case is not a proper one for review by this Court, and that jurisdiction of this case is not vested in this Court.

In Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194, 85 S. Ct. 871, 13 L. Ed.2d 753 (1965), this Court stated at 380 U.S. 196 that:

> . . . After plenary briefing and argument, however, we are unable to say with requisite assurance that this Court has jurisdiction in the premises.
>
> The California Supreme Court did not state whether its holding was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or the equivalent provisions of the California Constitution, or both. While we might speculate from the choice of words used in the opinion, and the authorities cited by the court, which provision was the basis for the judgment of the state court, we are unable to say with any degree of certainty that the judgment of the California Supreme Court was not based on an adequate and independent nonfederal ground. This Court is always wary of assuming jurisdiction of a case from a state court unless it is plain that a federal question is necessarily presented and the party seeking review here must show that we have jurisdiction of the case.

In Jankovich v. Indiana Toll Road Comm., 379 U.S. 487, 85 S.Ct. 493, 13 L. Ed.2d 439 (1965), this Court held that its writ of certiorari had been improvidently granted and would be dismissed, stating in pertinent part at 379 U.S. 491 that:

> The discussion of the second question--whether the ordinance effects a proscribed taking, as opposed to a reasonable regulation under the police power--similarly interlaces Indiana and federal decisions, as well as decisions of other state courts.

> Again there is no intimation that the conclusion that the ordinance entails 'an unlawful and unconstitutional appropriation of property rights without payment of compensation,' 244 Ind, 193 NE2d, at 242, is based less forcefully on the Indiana Constitution than on the Fourteenth Amendment.
>
> [3] In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent
>
> *[379 US 492]
>
> and adequate *ground of decision depriving this Court of jurisdiction to review the state judgment. New York City v Central Savings Bank, 306 US 661, 83 L ed 1058, 59 S Ct 790, explained in Minnesota v. National Tea Co., 309 US 551, 556-557, 84 L ed 920, 923, 60 S Ct 676; Lynch v New York ex rel. Pierson, 293 US 52, 79 L ed 191, 55 S Ct 16.

In State of California v. Krivda, ____ U.S. _____, 93 S Ct. _____, 34 L. Ed.2d 45 (1972), this Court recently held that a decision of the Supreme Court of California would be vacated and the case remanded to that Court for further proceedings when this Court was unable to say with any degree of certainty the decision was not based on an adequate and independent nonfederal ground. However, the opinion in that decision fails to reflect the presence in that case of a more stringent and protective state constitutional provision such as Article I, Section 12, of the Florida Constitution,

and fails to reflect the presence of a more stringent and protective state statutory provision such as Section 933.18, Florida Statutes 1971. Because of said provisions dismissal or denial is more appropriate to this cause than such remand.

Respondent therefore respectfully submits that the Petition for a Writ of Certiorari to the Supreme Court of Florida fails to demonstrate that said decision was based upon and decided a federal question of substance, and said petition should be denied.

POINT TWO

THE PETITION FOR A WRIT OF CERTIORARI FAILS TO ESTABLISH THAT THE SUPREME COURT OF FLORIDA HAS DECIDED ANY FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY NOT IN ACCORD WITH PRIOR APPLICABLE DECISIONS OF THIS COURT.

Respondent will not herein reiterate all the shortcomings of the affidavit herein considered nor attempt to treat the merits of this cause at this time. However, as to the propriety of these proceedings and the entitlement of the petitioner to issuance of the writ requested, it is appropriate to point out that the decision of the Florida Supreme Court fails to conflict with any of the prior decisions of this Court relied upon by petitioner, Florida.

In U.S. v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed.2d 684 (1965), which is the primary case relied upon herein by Florida, the affidavit expressly stated, under oath, that the information set forth therein was based upon the observations of the affiant officer or upon reports made to affiant officer by other officers describing the results of said other informing officers observations and investigations. Upon said basis the affidavit was upheld.

In contrast to the foregoing, and as expressly held by the Supreme Court of Florida, the affidavit in the case sub judice demonstrated that affiant had no personal knowledge of

the alleged events described; made no showing of informant Sheridan's knowledge (whether personal or hearsay and if hearsay of good reason to believe it); made no declaration or showing that informant Sheridan was reciting information from any official record; and contained no allegation that affiant even knew informant Sheridan.

In light of the foregoing, it is clear that the decision of the Supreme Court of Florida does not conflict with the holding of this Court in U.S. v. Ventresca, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed.2d 684 (1965).

It is further clear that where the affidavit in the case sub judice was based totally on hearsay - an informer's report - and where the affidavit failed to declare either that the informant had himself observed the facts asserted or, if hearsay, the origin of same and good reason for crediting it, there was no basis for determination of probable cause by an independent magistrate, and the holding of insufficiency conflicts with neither Spinelli v. U.S., 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed.2d 637 (1969), nor Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed.2d 723 (1964).

Similarly, the holding of insufficiency is in no manner inconsistent with the decision of this Court in United States v. Harris, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed.2d 723 (1971),

for the affidavit in that case recounted personal and recent observations by the informant showing that the information had been gained in a reliable manner.

Respondent respectfully submits the Supreme Court of Florida, in light of the patent insufficiencies of the affidavit, was entirely correct in its holding that:

> . . . Any conclusion of a crime to be drawn from the affidavit rests upon a hopeless pyramiding of inferences. Agent Bondurant may 'in his opinion' have had good reason for 'his' belief that a search warrant should be issued, but that is not the legal test to be applied where his conclusion is based on hearsay. The affidavit of 3 typewritten pages, containing numerous handwritten corrections, was obviously no sudden ebullition, and could have easily contained the factors we have commented on, if known and if true.
>
> Law is and should be profound, and our conclusion is not to be construed as an avalanche of vituperation. In this case only, and upon these given facts, the affidavit falls short of being sufficient.

Respondent further respectfully submits that said decision is more in accord with, than in conflict with, prior applicable decisions of this Court, and that the requested writ should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Supreme Court of Florida is without merit and should be denied.

Respectfully submitted,

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and

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA has been furnished by United States Mail to counsel for petitioner, Honorable Robert L. Shevin, Attorney General, and Honorable Enoch J. Whitney, Assistant Attorney General, The Capitol, Tallahassee, Florida, this ____ day of _____, 1973.

_____
ATTORNEY